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SYMPOSIUM ON NEW ZEALAND'S EMPLOYMENT CONTRACTS ACT 1991

INTRODUCTION: CONFRONTING THE EMPLOYMENT CONTRACTS ACT

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In my opinion, the 1990s is the age of work and the worker. The evidence is everywhere around us. It's hard to pick up a newspaper or magazine without seeing the subject of work. Not a week goes by without a story about the globalization of work or about new technology and its impact on work—how work is done, who will hold the new jobs, and who is hurt and who gains by these changes.

Sometimes work is less visible, but it is there nonetheless playing a central role. For example, when we talk about environmental issues, we are talking about work. Work and business activities often lead to pollution. Businesses want to expand their markets, yet ever rising production and consumption will harm the environment. What we decide to do about the environment will mean not only jobs or no jobs but may also create some jobs cleaning up the environmental damage done by workers in other jobs. Yet other workers will provide care for those workers injured by the jobs that have also harmed the environment.

Occasionally we read about rising worldwide unemployment and the end of work. If it is true that technology, increases in productivity, changes in consumer preferences, and other forces are creating a situation in which

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there can not be enough work to occupy the workers available, what will this mean? How will society change in the face of enforced leisure? Or will this happen at all? Are the forecasters wrong?

Work runs through each of our own lives and forms a core which determines the scope of our existence. The truth is, we are all desperately dependent on work. I wonder, though, are they right? Take away our jobs, and who and what are we? Our own jobs—or lack of them—give us our status, our friends, our enemies, our viewpoints, our opportunities, and our children's opportunities—or lack of them. Work provides structure and organizes our days, our weeks, and our years. Take away the job from a person, and the person may collapse immediately or deteriorate slowly or use this as an impetus to find new work and a new identity or fall from the middle class into the lower class when nothing but minimum wage work is available. The person is the same, but the job the person is or is not doing transforms nearly everything about that person.

The impact is not only personal. Jobs affect the life, health, and death of the places where we live. We all know what a community filled with good or bad jobs looks like. When a town has workers with high-paying jobs, it will have an attractive downtown of Persian rug stores, luxury gift "shoppes," expensive restaurants, theaters, travel agents, and designer clothing stores. Move a town over to the one where jobs are few and the workers poorly paid. Here you find rent-to-own stores, fast food restaurants, and second hand shops amidst empty or even boarded-up stores. You can walk the streets of the wealthy town at night and feel secure. The poor area will be dangerous, a place where you dare not go at night. Studies show that when work declines, social ills rise.¹ Even the wealthy community can't grow too self-satisfied. We've all seen the parts of town where the doctors once lived, the large homes now divided into rooming houses or abandoned and derelict. No one is immune from economic decline. Add or subtract a few jobs, and a community can grow or decline.

The conclusion is inescapable. Work is not just a private matter. The content of the pay packet, what the job does to the human body and spirit, and the opportunities it creates or stifles—all these spill over into our environment and society.

When we start to talk about work, the subject soon turns to unions. Some say unions are now dinosaurs, once useful, but no longer relevant.² Many argue that unions are too adversarial for our new age, that more modern forms of workplace organization, such as labor-management coopera-

1. BARRY BLUESTONE & BENNETT HARRISON, *THE DE-INDUSTRIALIZATION OF AMERICA: PLANT CLOSINGS, COMMUNITY ABANDONMENT, AND THE DISMANTLING OF BASIC INDUSTRY* 49-81 (1982).

2. For a description of such agreements in New Zealand, see Ellen Dannin, *Labor Law Reform in New Zealand*, 13 N.Y.L. SCH. J. INT'L & COMP. L. 12-14 (1992), and NEW ZEALAND EMPLOYERS' FEDERATION, *THE BENEFITS OF BARGAINING REFORM* (1990).

tion, are superior.³ The figures seem to demonstrate that unions are being rejected. Union density rates have declined around the world—more quickly in some countries than in others, but with no country immune to the trend.⁴ Odds are that the people reading this may have had little or no personal experience with unions. What impact then, if any, can union decline have on us personally?

The answer may be: more than appears at first glance. A fair reading of history shows that unions around the world have waged the fights for improved working, social, and living conditions. Union concepts like seniority, procedural and substantive workplace rights, and grievance procedures have spread beyond the unionized workplace. Union wages and benefits may be the yeast that helps others rise. Legislation that applies to all employees in the United States exists because unions did the research and applied the pressure to get it enacted.

If unions are no more, who will apply the pressure for anti-discrimination laws, fair wages, and workplace health and safety regulation? Indeed, what would a world without unions be like? What is the cause and significance of their worldwide decline? Have we sufficiently appreciated the value and role of unions and the empowering and democratizing impact of union membership and representation? Should we try to reverse their decline, or should we simply regard their disappearance as an inevitability, an unavoidable artifact of modern society and the changes that have taken place in recent decades?⁵

Amidst this discussion about work and unions is a more complex debate about work, unions, society, and, of course, law. Should law try to help or hinder the processes of production? Can law do either? Should laws be enacted to help unions survive or, rather, promote the tools of labor-management cooperation if our goal is to build a more productive, conflict-free workplace? Or, on the other hand, should laws place more restrictions on corporate power?

The debate in the United States represents much the same range of reform proposals as in most other developed countries. Some reformers contend that employer:union power has swung out of balance because of the way labor laws are applied and enforced.⁶ Some propose moving to a system

3. See, e.g., Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827 (1996).

4. Richard Freeman & Joel Rogers, *Who Speaks for Us? Employee Representation in a Non-union Labor Market*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 13 (Bruce Kaufman & Morris Kleiner eds., 1993).

5. See, e.g., Michael Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. 2767 (1991); Werner Sengenberger, *Intensified Competition, Industrial Restructuring and Industrial Relations*, 131 INT'L LAB. REV. 139 (1992).

6. WILLIAM COOKE, *UNION ORGANIZING AND PUBLIC POLICY: FAILURE TO SECURE FIRST CONTRACTS* 144 (1985); PAUL WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990).

based on individual contracting.⁷ Others promote labor reform “based on direct governmental intervention guaranteeing individual rights to employees and substantive protections to unions under labor laws, that are designed to alter the power imbalance between employees and employers.”⁸ Some argue that labor problems are rooted in patriarchal conceptions of power and that only fundamental change based on feminist philosophy can empower workers and revitalize labor unions.⁹ Suggestions have ranged from major legislative supports for unions¹⁰ to more subtle legislative or regulatory tinkering.¹¹ Others contend that unions themselves are to blame because they have been “complacent, have lost their sense of mission, have assigned incompetent people to organizing, and have failed to adopt organizing tactics in response to changing conditions,” problems which cannot be solved by legislative action.¹²

All these proposals assume a connection between outcomes—such as union representation or increased productivity or justice—and law. Some view law as the enemy at the same time they turn to law for their salvation. The difficulty in untangling these complex social and legal issues is that the social sciences have trouble being scientific in the way the physical sciences can: there are no experiments, with control groups and replicability, that can answer these important questions. As a result, discussions about work, unions, and law reform are as passionate as they are speculative.

There is not and probably never will be a social science laboratory in which we can run experiments to test how various laws would work. Our oldest models of labor statutes have promoted worker collectivization, union representation, and collective bargaining. In the last decade, however, we have what is claimed to be a new model of labor law that may provide a sort of laboratory: New Zealand’s Employment Contracts Act, 1991. New Zealand legalized collective bargaining in 1894, nearly half a decade before this was done in the United States. When the ECA became law on May 15, 1991, it replaced nearly a century of legalized collective bargaining with a fundamentally different statutory system for setting workplace terms.¹³

7. See Marion Crain, *Images of Power in Labor Law: A Feminist Deconstruction*, 33 B.C. L. REV. 481, 525 (1992) for sources.

8. *Id.* at 525-26 (views of Critical Legal Studies theorists).

9. Marion Crain, *Feminism, Labor and Power*, 65 S. CAL. L. REV. 1819 (1992).

10. Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 578-84 (1992).

11. Charles Morris, *Renaissance at the NLRB—Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board*, 23 STEYSON L. REV. 101 (1993); THOMAS KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* (1994); Ellen Dannin, *Labor Law Reform—Is There a Baby in the Bathwater?*, 44 LAB. L.J. 626 (1993).

12. Julius Getman, *Ruminations on Union Organizing in the Private Sector*, 53 U. CHI. L. REV. 45 (1986); MIDWEST CENTER FOR LABOR RESEARCH, *LET’S GET MOVING! ORGANIZING FOR THE ‘90’S* (1991).

13. For a description of how the ECA was enacted, see ELLEN DANNIN, *WORKING FREE: THE ORIGIN AND IMPACT OF NEW ZEALAND’S EMPLOYMENT CONTRACTS ACT* (1997); Ellen

Although it does not overtly resemble U.S. labor statutes, many philosophical aspects of the ECA will seem quite familiar to U.S. lawyers. The ECA resembles some aspects of the legal system which the National Labor Relations Act was enacted to replace.¹⁴ The ECA's grounding in freedom of contract and association derive from ideas developed by Professor Richard Epstein of the University of Chicago law school.¹⁵

Despite its origins in the United States, the ECA creates a statutory regime that is fundamentally unlike other collective bargaining statutes and even unlike at-will employment. Under the ECA, employment contracts can be individual or collective. A contract is collective if two employees sign it.¹⁶ Unions are not outlawed; they can become agents to represent individual workers. A union must have current individual authorizations from each employee it claims to represent.¹⁷ Employers are required to recognize the bargaining authority of a representative,¹⁸ but recognition means virtually nothing; it certainly does not require bargaining. Nothing supports union existence or collective action; although the system is supposed to rely on unfettered market forces and free choice, aspects of the ECA actually work against collectivity, even in instances in which collectivity is the relationship which was freely chosen by the employer and employees.¹⁹ In other words, the ECA is a direct repudiation of traditional labor law systems which support collective action, collective bargaining, and unions as the means of controlling workplace relations.

The enactment of the ECA, legislation which transformed a highly protective industrial relations system to one founded on the principles of freedom of contract, freedom of association, and unrestrained market forces, is a story of high drama. When the Employment Contracts Bill was introduced on December 19, 1990, two months after the National Party took office, it set May 1, 1991, as its effective date. The ECA was enacted in the face of popular opposition; 500,000 of a population of 3.1 million—nearly

Dannin, *We Can't Overcome? A Case Study of Labor Law Reform*, 16 BERKELEY J. EMP. & LAB. L. 1 (1995).

14. See Ellen Dannin, *Cooperation, Conflict or Coercion: A Response to Professor Estreicher* (May 30, 1997) (unpublished paper presented at the Law and Society Association Conference, St. Louis, Missouri, on file with author).

15. For a discussion of how Richard Epstein's ideas were transmitted to New Zealand, see Ellen Dannin, *Consummating Market-Based Labor Law Reform in New Zealand: Context and Reconfiguration*, 14 B.U. INT'L. L.J. 267 (1996).

16. Employment Contracts Act § 2, 1991 (N.Z.) [ECA].

17. ECA §§ 12, 59; Ellen Dannin, *Solidarity Forever? Unions and Bargaining Representation Under New Zealand's Employment Contracts Act*, 18 LOY. INT'L & COMP. L.J. 1 (1995).

18. ECA § 12.

19. For example, ECA section 19(4) provides that if a collective employment contract expires and no successor contract has been agreed to, the workers are placed on individual employment contracts whose terms are based on the collective agreement. It is illegal to strike during the term of a collective contract. ECA § 63. As a result, negotiations will often start with the collectivity which was agreed to having been destroyed.

1/6 of New Zealand's inhabitants—demonstrated against it or struck against it.²⁰ Were they right or misguided to have opposed the legislation?

Select Committee hearings on the Bill were held throughout the country, and hundreds of written submissions were received from employers, unions, church groups, academics, associations, clubs, and individuals. Some expressed enthusiastic support, while others opposed the Bill. A few proposed changes. Once in awhile, there was a letter like that of Harry Harris. Harris explained that he worked for a grocery store in Palmerston North and had two children ages ten and seven. At the time he grossed \$339 a week, including overtime, and netted \$270. This was \$50 less than he would have received on the dole. Harris wrote to ask for clarification of what he had read in the paper. He said that, as he saw it, the only way he could get decent conditions under the ECA was to hire a capable bargaining representative. "Of course," Harris said, "it depends on who I can afford to hire, and as a family we struggle now, even cutting groceries back."²¹ What has become of those who wrote expressing fear, confidence, excitement, or concern? How have Harry Harris and his family fared over the past six years?

From 1894 to 1991, New Zealand labor law was one of the most protective of unions and unionization in the world. Union density was measured at between 60 and 70 percent. Within the ECA's first year, New Zealand unions lost approximately 50 percent of their members. Several unions disappeared. As of December 1996, New Zealand's union density was 19 percent, a drop of more than 30 percent in four and a half years.²² The significance of this drop is open to many interpretations.

The ECA is supposed to offer workers the ability to exercise their freedom of association. Each worker was to have the freedom to choose any representative or no representative. Can it be that when workers have freedom, unions are not what they choose, as some in New Zealand have asserted? Does this mean that, if unions can't exist without props from the state, they are illegitimate institutions, as some in New Zealand have argued? Or is the ECA profoundly anti-union legislation, as others have claimed?

Certainly, the ECA has transformed New Zealand society. The story of the ECA is not all about winners. Union density does not fall so far so quickly with no negative social consequences. There are reports that wages in New Zealand are very low.²³ Newspapers carry advertisements for jobs at

20. Ellen Dannin, *We Can't Overcome?*, *supra* note 13, at 74-87.

21. Letter from Harry Harris, New Zealand Citizen, to the Labour Select Committee (Feb. 8, 1991) (on file with author).

22. Raymond Harbridge & Aaron Crawford, *The Impact of New Zealand's Employment Contracts Act on Industrial Relations*, 28 CAL. W. INT'L L.J. 235, Table 2 (1997); RAYMOND HARBRIDGE & ANTHONY HONEYBONE, *EMPLOYMENT CONTRACTS: BARGAINING TRENDS & EMPLOYMENT LAW UPDATE: 1993/1994* (1994).

23. *N.Z. Manufacturing Workers Least Paid in West*, XINHUA NEWS AGENCY, Aug. 30, 1994, LEXIS News File 0830110.

no pay, and hundreds of job seekers have lined up, hoping that eventually the employer will take them on or hoping to gain experience so a paying job can be found somewhere else. Although it is a food exporting country, food banks now are a common resource for many newly impoverished New Zealanders. At Christmas 1993, three church officials announced that they did not consider it a sin to steal to feed one's family, the need was so dire. In April 1994, the International Labour Organisation (ILO) found cause to believe that the ECA violated important labor conventions.²⁴

On the other hand, some segments of New Zealand society have prospered under the legislation. Even some unions have experienced some improvements over the prior legislation, although all unions would say that the detriments have outweighed any positives.

Since becoming law, the ECA has been the focus of widespread global attention. Commonwealth countries, such as Canada, Australia, and the United Kingdom, have enthusiastically watched events in New Zealand. Some of the Canadian media praise New Zealand's liberalization of its economy as an example Canadians must follow.²⁵ In early 1994, *W5*, a Canadian news show, featured New Zealand government and public figures enthusiastic about their path to economic success. Roger Douglas, proponent of New Zealand's program of neo-liberal reforms, has made several speaking tours of Canada and the world. His *Unfinished Business* was at the top of best seller lists for weeks.²⁶ Other Canadians question these optimistic reports and the wisdom of such a course.²⁷

The Australian states of Victoria and Western Australia now have their own versions of the ECA: Victoria's Employee Relations Act, 1992,²⁸ Western Australia's Minimum Conditions of Employment Act, 1993,²⁹ and the Workplace Agreements Act, 1993.³⁰ During the 1996 federal elections, an important issue was whether and how much of the ECA would be imported

24. ELLEN DANNIN, *WORKING FREE: THE ORIGINS AND IMPACT OF NEW ZEALAND'S EMPLOYMENT CONTRACTS ACT 219* (1997).

25. Rafe Mair, *We Will Be Hearing More of Sir Roger and ACT New Zealand: Let's Hope Canadian Leaders Listen*, THE FINANCIAL POST, Mar. 10, 1995, at 11; John Schreiner, *Industry Has Thrived in New Zealand's "Revolution,"* THE FINANCIAL POST, Aug. 30, 1994, at 11.

26. Jim Levi, *Rogernomics Returns*, THE OBSERVER, Mar. 13, 1994, at 6; Murray Dobbin, *Remaking of New Zealand, Part I*, CBC IDEAS, Oct. 12, 1994.

27. Chris Bradshaw, *Ignore the Right! Don't Look to New Zealand for Debt Ideas*, VANCOUVER SUN, Feb. 6, 1995, at A8; Roman Cooney, *Contrived Crisis? Debt Load May Have Had Little to Do with New Zealand's Alberta-like Cuts*, CALGARY HERALD, May 12, 1994, at A5; Patricia Finn, *New Zealand "Model" Really a Mirage*, OTTAWA CITIZEN, May 19, 1995, at A11; Michael Kane, *Bearing Fruit in Land of Kiwis: New Zealand's Example Could Be Good for Canada*, VANCOUVER SUN, May 30, 1994, at D10; and Ted White, *New Zealand's Miracle: Labor Law Changes Brought Workers More Freedom, Income and Job Opportunities*, OTTAWA CITIZEN, May 26, 1995, at A13.

28. Employee Rel. Act, 1992 (Vict.).

29. Minimum Conditions of Employment Act, 1993 (W. Austl.).

30. Workplace Agreements Act, 1993 (W. Austl.).

to Australia.³¹

British papers argue back and forth over New Zealand. On March 13, 1994, for example, the [*London*] *Observer* expressed confidence that New Zealand's laws would or should be imported to other countries,³² and *The Independent* carried a story about New Zealand's rising violent crime, need for food banks, hunger, and despair.³³ Britain has played host to Roger Douglas numerous times. In March 1996, he and Labour Members of Parliament participated in a private policy conference sponsored by the Adam Smith Institute, a free-market think tank.³⁴

Other countries also appear to be considering ECA-inspired laws, including Finland, the Netherlands, Germany, and Sweden.³⁵ As the Japanese economy has stalled recently, it too has begun looking at New Zealand and the ECA.³⁶ Interest in the ECA has spread among government officials, business leaders, and the powerful before most of the world even knows it exists. This can be attributed, in part, to the New Zealanders who have proselytized tirelessly for it. Certainly one of the most tireless crusaders has been Roger Douglas. His book, *Unfinished Business*, says: "Roger Douglas has traveled as an international consultant advising on privatisation and structural reform in countries as diverse as Russia, Brazil, Mexico, Pakistan, Canada, Peru, Vietnam, China, Australia, South Africa and Singapore."

In the United States, proposals have been made for labor law reform that would be similar to the ECA. In 1994, amidst the early fervor for the Contract With America, the Employment Policy Foundation (EPF) urged labor law reform in terms that recall the campaign waged in New Zealand for the ECA. The EPF called for more flexibility in the workplace to enhance productivity and competitiveness.³⁷ House Majority Leader Newt

31. To get a sense of this, one would have to read the range of news stories with this focus. A sample would include: *Australians Keen on NZ Economic Reforms - Bolger*, REUTERS FIN. SERV., Mar. 2, 1996, LEXIS News File; Ruth Laugesen, *PM Defends Wage Growth after Gibes*, DOMINION, Feb. 14, 1996, at 2. See also John B. Howe, *The Role of Industrial Relations in Achieving Social Equity: A Comparison of Labor Laws in Australia and the United States*, 48 LAB. L.J. 336 (1997).

32. Jim Levi, *supra* note 26, at 6; see also David McKie, *And Now for Next Week's News . . . David McKie's Sneak Preview of the Issues We'll be Talking About*, THE GUARDIAN, Feb. 24, 1995, at T5.

33. Peter Walker, *What Happens When You Scrap the Welfare State? New Zealand Has, and its Economy is Stronger. But There is a Dark Side: One in Seven Below Poverty Line—Record Numbers of People in Jail—Armed Police on the Streets—Queues at Charity "Food banks,"* THE INDEPENDENT, Mar. 13, 1994, at 17.

34. David Rennie, *Is Labour Falling for Rogernomics?*, THE DAILY TELEGRAPH, Mar. 18, 1996, at 21.

35. Murray Dobbin, *Remaking of New Zealand, Part I*, CBC IDEAS, Oct. 12, 1994; Murray Dobbin, *Remaking of New Zealand, Part II*, CBC Ideas, Oct. 19, 1994; *New Zealand Now the Model*, THE EMPLOYER 2, Mar. 1994.

36. *EPA Chief Hopes to Learn from N.Z., Australia Deregulation*, KYODO NEWS SERVICE, JAPAN ECONOMIC NEWSWIRE, Aug. 22, 1995, LEXIS News File.

37. *Reassessment of U.S. Employment Law Called for in New Book on Competitiveness*, 222 DAILY LAB. REP. (BNA), Nov. 21, 1994, at D15.

Gingrich has encouraged study of New Zealand.³⁸ Professor Samuel Estreicher of New York University law school has long been advocating labor law reforms that bear a striking resemblance to those of the ECA.³⁹ His particular focus is on at-will employment as a basis for labor law reform.⁴⁰ This idea parallels in some ways those of University of Chicago Law School Professor **Richard Epstein**,⁴¹ and, as discussed, Epstein's thoughts in this area have been particularly influential on the drafters of the ECA. As a mark of his influence, in 1996, Epstein was brought to New Zealand to observe the changes that had been wrought. His contribution to this *Symposium* is a speech given during that visit.⁴² Although influential, Epstein's views have not been without controversy in New Zealand, as demonstrated by **Nick Wailes**'⁴³ critique of them.

What can we—New Zealanders and others—gain by studying the ECA? First, for legal scholars, there is an important story in the complex ways the ECA has affected New Zealanders. Much can be learned by considering the ways in which it is and has been discussed and understood there, in the successes and failures it illuminates, in the all-too-human reactions to it, as well as from the varying assessments of its failures and successes, the struggles to do the right and moral thing for society, and the attempts to know truth and to act on one's beliefs. All these are part of the ECA story, and they provide rich information on the processes of labor law reform. Furthermore, even though few in the United States have realized it,

38. Adrienne Perry, *Bolger Cited on Capitol Hill—Congress Complaints Focus on Meetings*, Apr. 29, 1996; Charles Lunan, *New Zealand Offering Congress Reform Ideas*, SUN-SENTINEL, Sept. 22, 1995, at 1D; *US Leaders to Look at N.Z. Economy—US Leaders Plan Visit to Look Over N.Z. Economy*, DOMINION, Mar. 30, 1995, at 1.

39. These views have been advanced in a series of articles. See Estreicher, *supra* note 3, at 827; Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening up the Possibilities for Value-Added Unionism*, 95 DAILY LAB. REP. (BNA) May 17, 1995, at E1; Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 107 DAILY LAB. REP. (BNA) June 5, 1995, at E10; Samuel Estreicher, *Collective Bargaining or "Collective Begging"?: Reflections on Antistrikebreaker Legislation*, 93 MICH. L. REV. 577 (1994); Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, in THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION 13, 43 (Matthew Finkin ed., 1994); Samuel Estreicher, *Win-Win Labor Law Reform*, 10 LAB. LAWYER 667 (1994); and Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3 (1993).

40. Estreicher, *supra* note 3, at 828-29. For an examination and consideration of Estreicher's proposals in the ECA context, see Dannin, *supra* note 14.

41. Richard Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); see also Gail Herriot, *The New Feudalism: The Unintended Destination of Contemporary Trends in Employment Law*, 28 GA. L. REV. 167 (1993). For an empirical study and a discussion of other views on Epstein's ideas on labor law, see Pauline Kim, *Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. (forthcoming 1997).

42. Richard Epstein, *Employment Law: Courts and Contracts*, 28 CAL. W. INT'L L.J. 13 (1997).

43. Nick Wailes, *Professor Richard Epstein and the New Zealand Employment Contracts Act: A Critique*, 28 CAL. W. INT'L L.J. 27 (1997).

the United States is already inextricably and deeply involved in these events because it was ideas from this country which have been used as the basis for many of the economic ideas put into practice in New Zealand beginning in 1984.⁴⁴ The time has come for those of us in the United States to examine the impact of these influences. Finally, from a more self-interested point of view, New Zealand's experiences under the ECA can provide empirical evidence as to how proposals resembling the ECA are likely to operate.

This *Symposium* opens a window on the ECA, presenting a wealth of information for both those new to the ECA and those who have studied it. Articles in this *Symposium* represent a broad spectrum of views and disciplines. Not only are all political views represented but so are academic disciplines, including political science, industrial relations, management, law, and economics. Not only are academics part of the *Symposium*; so, too, are the people who do the things the academics study, including representatives of employer groups, the judiciary, and unions.

When taken all together, this rich source material puts flesh and blood together with intellectual treatments of the ECA. There is an enormous range of style included. Some articles are essentially "a view from the trenches." Among these are articles by Trade Union Federation President **Maxine Gay** and **Malcolm MacLean** and by New Zealand Council of Trade Unions legal officer **Anne Boyd**. Their articles present a range of issues as to how the two union umbrella organizations in New Zealand have been faring under the ECA.⁴⁵ From a different part of the trenches, **Anne Knowles** describes how her organization, the New Zealand Employers' Federation, engaged in a decade-long campaign to achieve labor law reform, efforts that resulted in the ECA; and **Roger Kerr** presents the views of his organization, the New Zealand Business Roundtable, ally of the Employers Federation in seeking labor law reform.⁴⁶

Employment Court Chief Judge **Thomas Goddard's** article is a view from the bench, certainly a position on the scene of battle.⁴⁷ Indeed, debate over the merits of the Employment Court has been center stage in New Zealand for some time, as discussed by academic labor lawyers **Gordon Anderson**,⁴⁸ **Andrew Morriss**,⁴⁹ and **John Hughes**. **Hughes** adds to this

44. See, e.g., *THE MAKING OF ROGERNOMICS* (Brian Easton ed., 1989).

45. See Maxine Gay & Malcolm MacLean, *Six Years' Hard Labour: Workers and Unions under the Employment Contracts Act*, 28 CAL. W. INT'L L.J. 45 (1997); Anne Boyd, *The Freedom of Association and Bargaining Provisions in the Employment Contracts Act 1991: What Has it Meant for Trade Unions and the Process of Collective Bargaining in New Zealand*, 28 CAL. W. INT'L L.J. 65 (1997);

46. Anne Knowles, *The Employment Contracts Act 1991: An Employer History*, 28 CAL. W. INT'L L.J. 75 (1997); Roger Kerr, *The New Zealand Employment Contracts Act: Its Enactment, Performance, and Implications*, 28 CAL. W. INT'L L.J. 89 (1997).

47. Thomas Goddard, *Curial Institutions under the Employment Contracts Act: 1991 to 1997*, 28 CAL. W. INT'L L.J. 103 (1997).

48. Gordon Anderson, *Interpreting the Employment Contracts Act: Are the Courts Un-*

discussion by exploring how the Employment Court is likely to fare during the process of review now being engaged in by the Minister of Labour as a result of the Coalition Agreement entered into after the 1996 elections.⁵⁰ Management studies lecturer **Chester Spell**'s article, while not addressing the Employment Court itself, examines the ECA's approach to resolving disputes of rights and personal grievances, focusing mainly upon the Employment Tribunal level, as opposed to its reviewing institution, the Employment Court.⁵¹

Together, these two types of articles—experiential and academic—should provide the reader with a rich understanding of the complexity of experience under the ECA.

An important part of the discussion takes us beyond a focus on the law and courts to an examination of the ECA's performance as labor law. ECA supporters say they are solidly pleased with the law and readily cite statistics and anecdotes to show improved productivity, unemployment, and balance of trade figures and easing of workplace tensions. The ECA's supporters include the International Monetary Fund, the World Bank, and the Organization for Economic Cooperation and Development (OECD)—certainly groups with influence and power in the world. For example, the IMF credits the ECA with lowering New Zealand unemployment rates.⁵² The OECD substantially agrees with this positive view of New Zealand's reforms since 1984.⁵³

ECA critics remain strongly opposed to the legislation. They argue that it has created an unequal and unjust society. Even ECA supporters have quietly admitted to concerns about troubling, less discussed changes in New Zealand and the workplace. In 1993, for example, a Parliamentary committee appointed to study the impact of the ECA found the following about how workplace conditions were set:

[E]vidence received has also shown that some employers are using the removal of compulsory unionism as a way to tell employees less than before about their rights. Witnesses said that, especially in companies where the employer has actively encouraged staff to resign from a union, employers often impose contracts without negotiations. Sometimes these contracts contain scant information about employment conditions. Many witnesses, particularly from service and retail industries, said employers

determining the Act? 28 CAL. W. INT'L L.J. 117 (1997).

49. Andrew Morriss, *Specialized Labor and Employment Law Institutions in New Zealand and the United States*, 28 CAL. W. INT'L L.J. 145 (1997).

50. John Hughes, *The Employment Court, "Judicial Activist," and the Coalition Agreement*, 28 CAL. W. INT'L L.J. 167 (1997).

51. Chester Spell, *The Evolution of Rights Disputes and Grievance Procedures: A Comparison of New Zealand and the U.S.*, 28 CAL. W. INT'L L.J. 199 (1997).

52. Peter Norman, *IMF Seeks Labour Reform to Cut Europe's Jobless*, FIN. TIMES, Apr. 21, 1994, at 30.

53. Paul Atkinson, *New Zealand's Radical Reforms*, OECD OBSERVER 43, Apr. 14, 1997, LEXIS News File.

do not communicate with them about their contracts and frequently intimidate employees into signing contracts with the message that they will be dismissed if they do not.⁵⁴

Other reports suggest that productivity is lagging, quit rates are very high, and training and skills are inadequate. The *Symposium* articles by Brian Easton,⁵⁵ Clive Gilson and Terry Wagar,⁵⁶ Raymond Harbridge and Aaron Crawford,⁵⁷ Jane Kelsey,⁵⁸ and Erling Rasmussen and John Deeks⁵⁹ provide the sort of detailed empirical data that can be used to assess the impact of the ECA.

Which is it? Is the ECA a good system for labor law—the new, modern way to run a workplace? Is it evil or the product of greedy and powerful forces? Does the ECA offer a simple solution for complex problems? Can the phenomenon of the ECA be captured in simple pronouncements that mirror its plain thinking about how to set workplace conditions?

This *Symposium* lets us see the economic figures, the theories, as well as the ECA's human impact. Today it is a vitally important story. Groups such as the IMF, OECD, and World Bank have focused world attention on the ECA. Roger Douglas and others circle the globe telling the world that they once were socialists but have become converts to a new way of ordering society. We in the United States need to understand that these are not distant events on the far periphery of our concerns.

So much was claimed for the ECA—good and bad. It has both fulfilled these predictions and also operated in unanticipated ways. When we pay attention to them, they repay us by helping us understand the processes of fundamental, radical law reform and how they are shaped by and shape society.

Confronting the phenomenon of the ECA means asking difficult questions about the nature of the society we wish to have. In the face of the profound moral and ideological change wrought in New Zealand, it means asking questions based—not on economic theory alone but—on morality and justice. The articles in this *Symposium* help tell the story of the ECA's intellectual underpinnings; the social and economic exigencies which led to its enactment; and its economic, social, and legal impact.

54. REPORT OF THE LABOUR SELECT COMM. 20 (1993).

55. Brian Easton, *The Economic Impact of the Employment Contracts Act*, 28 CAL. W. INT'L L.J. 209 (1997).

56. Clive Gilson & Terry Wagar, *The Impact of the New Zealand Employment Contracts Act on Individual Contracting: Measuring Organizational Performance*, 28 CAL. W. INT'L L.J. 221 (1997).

57. Raymond Harbridge & Aaron Crawford, *The Impact of New Zealand's Employment Contracts Act on Industrial Relations*, 28 CAL. W. INT'L L.J. 235 (1997).

58. Jane Kelsey, *Employment and Union Issues in New Zealand, Twelve Years On*, 28 CAL. W. INT'L L.J. 253 (1997).

59. Erling Rasmussen & John Deeks, *Contested Outcomes: Assessing the Impacts of the Employment Contracts Act*, 28 CAL. W. INT'L L.J. 275 (1997).